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**NEW YORK STATE COMMISSION ON CABLE TELEVISION**

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September 29, 1993

Donna R. Searcy, Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, DC 20554

Re: MM Docket No. 92-266

Dear Ms. Searcy:

I am enclosing herewith an original and nine copies of comments submitted by the New York State Commission on Cable Television in the above-referenced proceeding.

Very truly yours,

John L. Grow
Counsel

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Encs.

Before the
**FEDERAL COMMUNICATIONS COMMISSION**
Washington, DC 20554

In the Matter of

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|---|---|---|
| Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992 | ) | MM Docket No. 92-266 |
| Rate Regulation | ) | |

# COMMENTS OF THE NEW YORK STATE COMMISSION ON CABLE TELEVISION

1. The New York State Commission on Cable Television ("NYSCCT") respectfully submits initial comments in response to the Third Notice of Proposed Rulemaking ("Third NPRM") released in this docket August 27, 1993. NYSCCT is an independent Commission with broad authority to promote and oversee the development of the cable television industry in the State of New York. NYSCCT is expressly authorized by Section 815(6) of the Executive Law of the State of New York to represent the interests of the people of the State before the Federal Communications Commission ("Commission").

2. In this Third NPRM, the Commission seeks comment on four issues. NYSCCT will address each of these issues in turn except that it believes the issues with respect to the rate implications of system upgrades or rebuilds can be addressed as one.

Addition or Deletion of Channels

3. At paragraphs 133 through 144, the Commission discusses various methods whereby a cable operator could take price cap adjustments at the time that channels are added to or deleted from a regulated service tier. The Commission notes at paragraph 133 that the Report and Order in this docket did not specify the appropriate methodology under

certain circumstances. Section 76.922(c) of the proposed rules provides, in pertinent part, that "after the initial date of regulation, the permitted per-channel charge for regulated programming services shall be,. . .(2) the prior permitted per-channel charge previously approved by a regulatory authority, adjusted for inflation and external costs in accordance with the price cap requirements set forth in subsection (d) below. . . ." Subsection (d)(1) provides only that "[p]ermitted per-channel charges for regulated programming services may be adjusted periodically on account of inflation."[1]

4. The Commission tentatively concludes that the new permitted per-channel rate following the addition or deletion of channels should be determined on the basis of the existing per-channel rate, as adjusted by the percentage difference between the benchmark rates before and after the change in the number of channels, and further adjusted for programming expenses. More specifically, if the addition of channels results in a benchmark rate which is 3% less than the permitted per-channel rate, as initially determined, then the initial rate will be (1) reduced by 3%, (2) further reduced by all programming expenses at the time of initial regulation, and (3) increased by the amount of all programming expenses at the time of the channel change on a per-channel, per-subscriber basis. This method would appear to maintain at least the same margin as contained in the benchmark rates and, presumably, would provide sufficient incentive for cable operators to add programming

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[1] In the Report and Order in this docket, and elsewhere, the Commission has consistently maintained that price cap adjustments could only be taken on an annual basis. NYSCCT suggests that it amend Section 76.922(d)(1) to include the word "annually" in place of "periodically." NYSCCT also urges the Commission to clarify when annual adjustments may first occur.

channels. We doubt, however, whether it will be sufficient to encourage cable operators to add channels to the basic service tier.

5. Since any change in the number of programming channels on the basic service tier would necessarily result in an increase in the rate for such tier, it is arguable that the cable operator would have to file notice with the franchise authority of the proposed addition or deletion of channels to the basic service tier at least 30 days in advance of implementation. Absent any clarification, it would also seem that Section 76.933(b) would enable a franchising authority to extend, for an additional 90 days, the implementation of the rate change with the result that the addition of the new channels could be deferred by the cable operator. In order that the rules not deter cable companies from adding programming services to the basic tier, the Commission should consider a vehicle whereby the addition of channels would not necessarily be delayed for up to four months. In any event, the Commission should clarify whether the rate regulation procedures are intended to apply to rate increases associated with the addition of new channels.

System Upgrades

6. At paragraph 145, the Commission solicits comment on whether cable operators with rates below benchmark levels that initiated or completed system upgrade shortly before rate regulation should be entitled to raise rates to benchmark levels. Frankly, we do not expect that the rates established by cable operators as of September 1, 1993 will be found to be below benchmark levels except in rare instances. Upon initial review of the effect of the September 1 rate adjustments in New York State, it is apparent that, the rate freeze notwithstanding, many cable operators have been able to maintain, and in some

instances increase, the revenue derived from the monthly service charge for regulated tiers. In New York State, substantial reductions in cable rates have been found to exist mainly with respect to additional outlets and equipment charges. Moreover, the fact that cable operators are free to remove channels from regulated tiers and to offer them on a per-channel, a la carte basis makes the benchmark comparison somewhat artificial.

7. In New York State there are many cable television systems that have recently completed, or initiated, or continue in the progress of, upgrades or rebuilds. In the vast majority of these cases, system improvements have been a condition of the franchise. In this regard, the Commission asks whether it should permit external cost treatment for costs of upgrades required by local franchising authorities. (Para. 153) The Commission also asks whether adjustments to rates based on such required upgrades afforded external treatment should be based upon cost-of-service standards or whether it should "permit local franchising authorities to determine the way in which rates would be adjusted to reflect upgrade costs, including over what period of time such costs would be recovered, the operator's profit on upgrade costs and other issues involved in cost-of-service standards." (Para. 154) The Commission recognizes that "this option would establish more local control and responsibility for adjustments to rates on account of upgrades." (Para. 154)

8. NYSCCT believes that system capacity and other technological features of cable systems are clearly within the scope of the legitimate concern of franchising authorities, are part of the franchising function, and local control over the degree to which such matters should influence rates is necessary and desirable. Indeed, allowing franchising

authorities to exercise such responsibility would be welcome and appropriate, given the general lack of discretion otherwise available to them under the rate regulatory scheme.

9. Where an upgrade is required by the terms of a franchise it is particularly essential that the franchising authority have the opportunity to make external cost adjustments to FCC benchmark standards or to apply cost-of-service standards in a manner which will ensure fulfillment of the obligation and enable the franchising authority to enforce the obligation. Since the Commission's current rules recognize that any franchise requirement is an external cost, upgrades required by the franchise would necessarily fall into this category. It is also observed in this context that the authority of franchising authorities to require upgrades is specifically sanctioned by Section 624 the Cable Communications Policy Act of 1984 (47 U.S.C. § 544).

10. NYSCCT also believes that whether or not a recent or current upgrade was completed or commenced in fulfillment of a specific franchise condition, that it is fair to presume that increased capacity and enhanced technological features are potentially beneficial to the franchise area and, therefore, that local authority over adjustments to rates based on the cost of an upgrade should essentially be the same as if the upgrade was required by the franchise.

Method of Regulation for Different Regulated Tiers

11. Finally, the Commission asks whether a cable operator should have the discretion to select different methods for justifying rates for different regulated tiers. NYSCCT agrees with the Commission's tentative conclusion that cable operators should be required to elect one approach for all regulated tiers. NYSCCT is particularly interested

in the invitation made by the Commission in paragraph 154, fn. 258 where it states that "we solicit comment on whether our rate regulations will in any event produce the same per-channel rates for different tiers if showings are based on the same cost or the same benchmark data." Upon examination of the FCC Form 393 applicable to rate justifications in accordance with the benchmark methodology, it appears to us that it is the intent of the Commission, absent a special showing by a cable operator that certain equipment is unique to the cable programming service tier, that the initial permitted per-channel rates for each tier be the same in any instance where a complaint is filed with the Commission for the cable programming services tier.

12. Pursuant to Section 76.556(b) of the Commission's rules, a cable operator has the burden of demonstrating that a rate for cable programming services is not unreasonable "by providing information and calculations that demonstrate that the rate in question falls at or below the permitted level." Form 393 is the vehicle for demonstrating that rates are reasonable. Section 76.957 provides that the Commission will "determine by written decision whether the rate for the cable programming service or associated equipment is unreasonable or not[.]. . .[and that it]. . .may order appropriate relief, including, but not limited to, prospective rate reductions and refunds." This section further provides that the Commission will deny the complaint if the rate is found to be reasonable. In light of the fact that the information and calculations required in Form 393 to establish the maximum initial permitted per-channel rate include a reduction on a per-subscriber, per-channel basis for installation and equipment costs assigned to the basic cable service tier, it would seem

that the Commission's decision on the cable programming service tier would necessarily include review of such costs.

13. If, for example, a complaint for a particular system was filed on or shortly after September 1, 1993, and the Commission determines the complaint in a reasonably expeditious manner but, in any event, before a franchising authority has completed an initial regulatory proceeding, it would appear that the franchising authority would have no practical alternative but to adhere to the Commission's determination on the permitted per-channel rate as the local determination would be appealable to the Commission. In other words, any determination by the Commission based on Form 393 would imply a substantive ruling on equipment and installation cost adjustments. NYSCCT urges the Commission to clarify this aspect of the joint regulatory structure under Commission rules.

Respectfully submitted,

NEW YORK STATE COMMISSION
ON CABLE TELEVISION

By:

John L. Grow, Counsel

Dated: September 29, 1993
Albany, New York